United States Court of Appeals

NINTH CIRCUIT

NO. 22036

NO 22036

WALTER F. KEYS,

Appellant,

vs.

WALTER DUNBAR, et al.,

Appellee.

APPELLANT'S OPENING BRIEF

FILED

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION

The Appellant is presently constructively a prisoner being held for an act made criminal by the State of California in violation of his rights secured by the United States Constitution.

> Article 14 of the Constitution of the United States "be deprived of life, liberty without due process of law" nor deny to any persons within its jurisdiction the "equal protection".
>
> Article 5 of the Constitution of the United States "due process of law". The aim of due process is to provide an impartial trial under established rules of judicial procedure whenever "life, liberty or property is at stake".
>
> Article 9 of the Constitution of the United States. This amendment further emphasizes that the Constitution is designed to serve the people and to "protect them" in the proper exercise of their rights.

The Appellant is presently denied of his sacrad heritage and to have the right of life, liberty and the pursuit of happiness, whereby he was never free to exercise his constitutional rights to a hearing in order to expunge the fraudulant conviction from the record. "The fact that a prisoner has served his full term does not render 'moot' the questions presented on an appeal" nor does it bar his rights to hearing to clear his name". Byrnes, In re; 2 6 c 2d 824; 161 p2d 376, 824. See also People V Chamness, 109 Cal App Supp. 778 (288 P.20) In re; Lincoln, 102 Cal App 733 (283 P965) 18 A.L.R. 867, 872.

Boykin V Huff, 121 F. 2d 865. "Petitioner alleged that he had been deprived unconstitutionally of an appeal. Briggs V White 32 F. 2d 108. Three years after judgment of conviction was entered. Also, Robinson V California 370 U.S. 660, 8 L. Ed 2d 758, 82 S. Ct. 1417; (1962) was heard after death of Petitioner.

Appellant was sentenced to prison by the Superior Court of California, City and County of os Angeles, case number assigned to the information charging Appellant with (3) counts in violation of section 274 of the California penal code, being 216093.

Sentence was imposed on December 31, 1959, and said sentence being 6 months to 5 years on each count, sentence to run concurrent with each other.

Appellant pleaded "not guilty" as to each and every count.

Prior to sentence of the instant case a "motion for continuance" was discussed in courts chambers (R.T. on appeal P. 55), motion was denied.

Thereafter an appeal was taken from the judgment and conviction and is reported in 187 Cal app 2d 246; on the forth day of January, 1960.

The Appellant was imprisoned in the county jail during the time of his appeal (Record P.P. 188, 207, 208, 211, 212) since October 26, 1959.

Appellant, while in prison at San Quentin, (a maximum security prison) and without the aid of transcript or his evidence filed, sixteen or more petitions from error corror

coram nobis to error coram vobis and unsuccessfully to secure Habeas Corpus relief, in the Superior Court, District Court of Appeal and the Supreme Court of the State of California.

Petition for a Writ of Habeas Corpus was filed in the United States District Court pursuant to 28 U.S.C. §2254, on October 30, 1963.

The Writ was never issued. Appellant appeals from the United States District Court,

1.) Opinion and order of March 10, 1964

2.) Order of March 25, 1964

3.) Memorandum Opinion and order of April 17, 1964

4.) Order of June 24, 1964

5.) Proposed order of February 21, 1966

6.) Order of January 26, 1967

and all other issues set forth in the record.

This Court has jurisdiction to review the judgment of the United States District Court pursuant to 28 U.S.C. §2253.

STATEMENT OF FACTS

The facts of the instant case, for the purpose of appeal are set forth in the following paragraphs.

In the information filed by the District Attorney of Los Angeles County, the Appellant was charged in counts one and two with the crimes of abortion committed upon Marcell Allen on December 10, 1958, and January 17, 1959; and in count three with the crime of abortion committed upon Laurie N. Scott, on March 12, 1959. (cl. tr. P.P. 1 to 3, by reference)

Appellant was arraigned and moved to dismiss the in-

formation, penal code section 995 of California, on June 16, 1959, and the motion was denied. (Ref. cl. tr. P.P. 4 and 5 inclusive) Appellant pleaded "Not guilty" on June 22, 1959, and the case was set for trial on July 21, 1959. The Appellant and all counsel waived "trial by jury" and it was stipulated that the case be submitted on the testimony taken at the preliminary hearing, each side reserving the right to offer "additional evidence" as counsel desired to present. (Ref. cl. tr. Page 7 inclusive) Case was continued to August 24, 1959. On this date, the court on its own motion, continued the case to Friday, September 11, 1959, (ref. cl. tr. Page 8)

On September 11, 1959, case was again continued on motion of Appellant because "his witnesses were absent", to October 6, 1959, reference (cl. tr. page 9). On October 6, 1959, People's witnesses ill; on motion of the people, case was continued to October 26, 1959. Reference (cl. tr. Page 10)

The court found the Appellant guilty on all three counts of abortion, reference, (cl. tr. Page 11).

Appellant was then taken to jail and returned to the court on November 25, 1959, where a substitution of attorneys was made, reference (cl. tr. Page 12).

On December 31, 1959, motion for continuance was denied, probation denied and Appellant was sentenced to state prison for the term prescribed by law on each count, the sentences as to each count to run concurrently with each other, reference (cl. tr. Page 13).

Appellant requested release from jail to take care of his daughter. Appellant had been in jail 72 days and promised

his daughter he would take care of her while her mother was in the hospital, reference made (Reporters Transcript on appeal case no. 216093, pages 55 and 56 inclusive.) The request was denied. His counsel at that time, Edward I. Gritz, quote,

> "I have read the probation report. I don't agree with it. Seems to be some reason the police officer in this case doesn't like the defendant. He was never convicted of anything and defendant doesn't have any prior record".

(Reference made Reporter's Transcript on appeal case no. 216093, Pages 56 and 57 inclusive) order removed.

The District Court of Appeal of the State of California, Second Appellate Division Three, affirmed the judgment of conviction. (See 187 Cal. app 2d 246)

SPECIFICATION OF ERROR

(1) Incompetency, negligence and ineffective or lack of trial counsel in violation of Fifth, Sixth and Fourteenth Amendment of the United States Constitution.

(2) Incompetency, negligence and ineffective or lack of counsel before sentence and on appeal in violation of Fifth, Sixth, Seventh and Fourteenth Amendment of the United States Constitution.

(3) Conspiracy on the part of trial attorney in allowing this conviction, resulting in denial of a fair and impartial trial under Article Five and Six of the Constitution of the United States.

(4) Use of perjured testimony to secure a conviction, in violation of Due Process clause of Fourteenth Amendment.

(5) Appellant was denied a hearing of his Petition for a Writ of Habeas Corpus in violation of Fifth, Ninth and Fourteenth Amendment of the United States Constitution.

(6) Defective indictment or information in violation of the United States Constitution of the Fourteenth Amendment.

(7) Defective sentence in violation of the United States Constitution Amendment Fourteen - and 654 of the California Penal Code.

(8) The Court was required to conduct a full evidentiary hearing to establish the existence of the facts set forth in the allegations in the Petition.

ARGUMENT

I

INCOMPETENCY, NEGLIGENCE AND INEFFECTIVE OR LIKE OF TRIAL COUNSEL IN VIOLATION OF FIFTH, SIXTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In Brubaker vs. Dickson, 310 F2d30 (1962), Page 33 (1 - 2) states that "allegations of fact outside the trial record must be considered in determining whether the Petitioner alleged a denial of Appellant's constitutional rights to the effective aid of counsel. A contrary rule would fall short of protecting this right".

When inadequate representation is alleged, the critical factual inquiry ordinarily relates to matters outside the trial record.

a.) "whether the defendant had a defense which was not presented".

b.) "whether trial counsel consulted sufficiently with the accused and adequately investigated the facts and the law".

c.) whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choices of trial tactics and strategy.

If the Petition, including Appellant's allegation of fact outside the trial record, present grounds which would entitle Appellant relief, he should be affored an opportunity to support

his allegations by proof, (3) see

In Palmer vs. Ashe, 342, 137, 138, 72S. Ct. 191, 96 L. Ed. 154 (195)

In Hawks vs. Olson 326, U.S. 271, 274, 278, 66 S. Ct. 116, 90 L. Ed. 61 (1945)

In Jones vs. Huff 80 U.S. App D.C. 254, 152 F 2d 14, 16, (1945)

In Luce vs. Overlade, 244, F 2d 68 (111), the Court held that there was ineffective representation by counsel when the attorney is "so lacking in diligence and competence that the accused is without representation and the trial is reduced to a sham".

In Turner vs. Maryland, 303F 2d 507 (511), the Court said that requirement of effective counsel is not satisfied if the lawyer makes merely a perfunctory appearance and does nothing whatsoever before or during the trial to advise his client or protect his rights.

The Court in Schaber vs. Maxwell, 348 F. 2d 664 (669), quoted Ellis vs. U.S. 356 U.S. 674, in which it was held that "representation in the role of an advocate rather than that of Amicus Curia is required".

In Coplan vs. United States 191F 2d 749 at 760. The Circuit Court of Appeal of Washington, D.C., in reversing the judgment of conviction against "Juddy Coplan", said: "a defendant in a criminal case may not be legally found guilty except in a trial in which his constitutional rights are scrupulously observed, no conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the "effective assistance of counsel or any other element of due process of law" without

which he cannot be deprived of "life or liberty".

In Dodd vs. United States 9 Cir 1963 321 F. 2d 240 and the cases cited therein, "conduct of attorney must be so incompetent as to make the trial a farce".

In Grand Grove vs. Garbadi Grove 1900 130 C 116 62 P. 486, 80 AM Rep 80, "If it was left to the defendant to determine the competency of cousel, then the defendant would not need counsel in the first place and that is why we have decisions as follows:"

In McKinney vs. United States, 1953 C.A.D.C., 208 F. 2d 844. The right to representation by counsel is a right requiring strict protection of the courts.

In People vs. Massey, 1955 137 Cal. 2d 623, "Desertion of a client is inexcusable".

In Gross vs. Gould, 131 Mo. A;;. 585, 110 SW 672, "Where attorney falsely stated that the defendant didn't care to contest".

In Crawford vs. Williams, 1851 1 Swan (Tenn) 341, " Defendant had a meritorious defense but conferred with an attorney who did not give it proper attention".

In Gadsden vs. United States, 1955, 96 U.S. App. D.C. 162, 223 F2d 627, the court held "the court's duty to protect accused rights against defective counsel".

In Powell vs. Alabama, 287 U.S. 45, is what might be called the landmark of the law on state cases involving counsel and outlines duties of both counsel and the courts.

Appellant's attorney of record, F. Fernandez Solis, at the

trial, undertook and faithfully promised and agreed to represent Appellant as his attorney in Case No. 216093. Prior to the trial, Appellant employed said attorney under an oral and written agreement, to represent him in the above cited case. Attorney agreed to represent Appellant in a proper, skillful and diligent manner. Appellant had a meritorious and sufficient defense to said action. Appellant's attorney of record before and at the trial, was incompetent, negligent and ineffective as attorney for Appellant as follows:

a.) at the time of trial and before trial, counsel of record, having relevant and material evidence in support of Appellant's defense, failed and neglected to offer same to the trial court. (Record P.P. 185, 186, 187, 190, 193, 194, 195, 196, 197)

b.) trial counsel failed to present alibi evidence relating to all the counts in the information. Appellant instructed and informed counsel of said alibi evidence. (Record P.21 line 10 - 16)

c.) trial counsel failed to present material witnesses relating to the offense charge in all counts. Appellant instructed and informed counsel of said witnesses before trial. (Record P.22 line 14 - 20. Also, P. 181, 182, 183, 184 and 185)

d.) trial counsel failed or neglected to subpoena evidence and witnesses for Appellant's defense. Trial counsel was aware of both witnesses who could testify and prove by their testimony that

Appellant was not in the state at the time the crimes were committed. (Record P. 22, line 14 and Page 181, 182, 183) also, Page 184 and 185, where it shows the name of the police officer, Robert Herrera, on the face of the registration card of the Riviera Hotel in Nevada. (Record P. 185)

f.) trial counsel, failed to cross-examine witnesses for the prosecution, never objected to leading questions, or to the conflicts of evidence, or to any pertinent points. Said attorney otherwise represented the Appellant in an ineffective and incompetent manner.

g.) trial counsel not only suppressed the evidence to the trial court, but also suppressed and failed to give up the evidence to the new attorney of record, Edward I. Gritz, (Record: P. 189, line 21 to end,) or to anyone else. (Record: P. 21, line 29 through 32, and P. 22 line 1 through 3)

h.) trial counsel abandoned his client. (Record P. 188 line 1 through 14)

As a proximate result of said conduct of the attorney, Appellant has been convicted, sentenced and confined and will continue to suffer until this fraudulent conviction has been expunged.

Said attorney negligently performed his duties as attorney for Appellant in that said attorney failed to follow Appellant's

instruction to proceed with his defense and to call witnesses and introduce all the evidence before the court, so that it could determine all the facts in the case.

On October 26, 1959, at the time of trial, said attorney left the court room after judgment was pronounced and abondoned Appellant. (Record Page 188 line 8 through 14). After said date, Appellant was removed to county jail and said attorney failed to make arrangements to visit Appellant and gave no explanation to anyone and took the transcript of the preliminary hearing and all Appellant's evidence with him. When a substitution of attorney had been made, this evidence was not released to the new attorney of record and when he was asked why, his reply was that he could not find the evidence or had misplaced it. (Record Page 14 line 31 and Page 15 line 1 and 2)

Each ground set forth in itself indicates an independant violation of the constitutional rights of the Appellant.

Certainly the lack of advocacy as occured in this instance, is so blatent and apparent on its face will cause one to wonder whether the appearance of Appellant's "counsel" was not in fact on behalf of the prosecution. Therefore, the Appellant alleges, that the lack of proper representation of his counsel at the trial and before trial, was one of the misapprehensions of the effect of him being found guilty of a crime he could not possibly commit.

II

INCOMPETENCY, NEGLIGENCE AND INEFFECTIVE OR LIKE OF COUNSEL BEFORE SENTENCE AND ON APPEAL IN VIOLATION OF FIFTH, SIXTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

"Article 5 of the Constitution of the United States"

"Nor be deprived of life, liberty, or property without due process of law".

"Article 6 of the Constitution of the United States"

The sixth amendment enumerates specific rights and that is, to have compulsary process for obtaining witnesses in his favor and to have the assistance of counsel for his defense, and to be informed of the nature and cause of assusation.

"Article 14 of the Constitution of the United States"

"No state shall make or inforce any law which shall abridge the priviledges or immunities of citizens of the United States, nor shall any state deprive any persons of life, liberty or property without due process of law, nor deny to any persons within its jurisdiction, the equal protection of the law."

NOTE:

Cases relied upon as to this ground are set forth and cited in Appellant's first cause of action and need not be repeated here.

On or about November 25, 1959, Appellant employed attorney Edward I. Gritz to represent him in the instant matter before this court.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

At all times mentioned, Appellant's counsel undertook and faithfully promised and agreed to represent Appellant as his attorney in this action, in a proper, skillful and diligent manner.

On or about December 31, 1959, at the date the probation hearing and before sentence in this instant case, the Appellant instructed his attorney, Edward I. Gritz, to move for a new trial on legal grounds that relevant and material evidence to establish Appellant's innocence of the crimes charged was not presented at the trial. Said attorney negligently performed his duties as attorney for Appellant as follows:

a.) Said counsel failed to follow instructions to move for a new trial;

b.) Said attorney offered no legal cause why judgement sould not then be pronounced;

c.) said counsel filed an opening brief for Appellant Record P.P. 199 through 205, in connection with an appeal in said action;

said opening brief failed to contain any reference to count three of the charge of abortion contained in said action, although the Appellant was convicted and sentenced on each of the three counts charged. Record P.P. 200 through 205.

Attorney's failure to make reference to count three, makes it a very serious error; an error

sufficient for a reversal;

d.) said counsel failed to file a closing brief on behalf of Appellant Keys, and

e.) said counsel failed to present argument in support of said appeal.

At all times mentioned, Appellant reposed his trust and confidence in said counsel and relied upon his integrity, skill, prudence and diligence. That the action of said counsel was done secretly and was fraudulently concealed from the Appellant while he was in county jail. Record: P.P. 207, 208, 212

Appellant states that each one of the irregularities set forth in itself are independant violation of the constitutional rights of Appellant.

III

CONSPIRACY ON THE PART OF TRIAL ATTORNEY IN ALLOWING THIS CONVICTION, RESULTING IN DENIAL OF A FAIR AND IMPARTIAL TRIAL UNDER ARTICLE 5 AND 6 OF THE CONSTITUTION OF THE UNITED STATES.

Counsel of record at the time of trial, had in his possession documented proof that Appellant was in another state at the time of the mission of the crime as alleged in count two and three. Record P.P. 185, 186, 187, 193, 194, 195, 196, 197. Said evidence being a letter from the management of a large corporation (Record P. P. 194, 197) and the aforesaid evidence that the Appellant was in that state on the dates of counts two

and three. That the Appellant conveyed this knowledge to his counsellor along with other facts,

a.) that the Appellant was in the company of a sergeant at the Los Angeles Police Department as shown in exhibit. Record P. 185. Said police sergeant testifying under oath and at a later date, signed an affidavit to this effect. Record P. 184.

b.) that the Appellant had also conveyed knowledge to counsel of record of a material witness who would rebut and challenge the testimony of the state's main witness in count one and two. Said witness, at a later date, signed and submitted her affidavit (Record P.P. 181, 182, 183). The affidavit, if examined, will show and disprove the testimony of the prosecutrix in counts one and two. This witness was not subpoena.

Appellant made many requests to the attorney of record (Record P.P. 23 and exhibits not numbered but enclosed in the Record after Page 23) for his affidavit which would recite that he did not subpoena my witnesses which were present earlier and were absent on October 6, 1959, (Record 191), and that he forward to me my evidence. Appellant's counsel ignored his request. Further that this evidence was mailed directly to counsel of record in sufficient time for trial. It was this evidence which was to have been used at the trial.

Denial of a fair and impartial trial, Amrine v Fine, 131 F 2d, 827 - 832).

"Article 5 of the Constitution of the United States"

"Nor be deprived of life, liberty, or
property without due process of law".

The aim of due process is to provide an impartial trial under established rules of judicial procedure whenever life, liberty or property is at stake.

"Article 6 of the Constitution of the United States"

The sixth amendment enumerates specific rights and that is to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

IV

USE OF PERJURED TESTIMONY TO SECURE A CONVICTION, IN VIOLATION OF DUE PROCESS CLAUSE OF 14TH AMENDMENT.

In Darcy vs. Handy, 130 Fed Supp 270, 224 F 2d 504.

Appellant submitted to the various courts the evidence and affidavits, Record P.P. 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, and 208, of persons whom would disprove the testimony used in securing the conviction

Appellant submitted this evidence along with a petition of Habeas Corpus in and for the County of San Luis Obispo.

Said court having jurisdiction over the locale and place of detention of Appellant praying that this court go into the whole matter and review the evidence that was not previously presented. This was denied.

Appellant did then, on May 17, 1963, file an appeal on this

petition with the Appellant Court, re: 2 Crim 9114, this was denied June 3, 1963. However, informal and notwithstanding the technicalities involved, Appellant believes that when the evidence supports the allegations, these technicalities and informalities should not afford justification for ignoring the high traditions of justice; therefore allowing a layman the benefit of the broader scope on the interpretation of these faults. The courts refused to consider this evidence in violation of the 14th Amendment of due process clause.

V

APPELLANT WAS DENIED A HEARING ON HIS PETITION FOR A WRIT OF HABEAS CORPUS IN VIOLATION OF FIFTH, NINTH AND FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

"Article 5 of the Constitution of United States".

"Nor be deprived of life, liberty or property without due process of law" "to provide an impartial trial under established rules of judicial procedure".

"Article 9 of the Constitution of United States".

"that this Article further emphasizes that th the Constitution is designed to serve the people and to protect them in the proper exercise of their rights".

"Article 14 of the Constitution of United States".

"Nor shall deprive any persons of life,

> liberty, or property, without due process of law".
>
> "Nor deny to any person equal protection of the law".

In Assmann vs. Fleming, C.C.A. Neb. 1947, 159 F2d 332.

> "Fraud and circumvention in obtaining a judgment are ordinarily sufficient gounds for vacating a judgment, particularly if party was prevented from presenting merits of his case".

In Dausuel vs. Dausuel, 1952, 195 F2d, 774 90 U.S. App.D.C. 275.

> "Court may at any time set aside judgment for --------after discovered fraud upon the court".

In Bratnover vs. Illinois Farm Supply Co., Minn. 1958, 169 F. Supp. 85.

> "In order to set aside a prior judgment, proving parties make it clearly appear that they have a good defence to action, and by fraud, mistake or like equitable basis, they were deprived of their day in court".

In Seria vs. Badger Mert. Ins. Co., C.A. Mass. 1959, 266 F2d 418.

> "Petitioner is entitled to relief under subdivision (b) of Rule 60 U.S.A. C. 28 Federal Code of Civil Procedure, dealing with relief from judgment or order in case of mistake, inadvertance excusable

neglect, newly discovered evidence, FRAUD, etc."

Note #24

> "Judgment obtained through fraud, misrepresentation or other misconduct should be vacated by the use of this rule and such rule is remedial and should be liberally construed - Id."

In Parker vs. Cheeker Taxi Co., C.A. Ill., 1956, 238 F2d 241.

> "Inherent right of court to vacate judgment for fraud".

In Darr vs. Burford, 339 U.S. 200 Constitutional Clause 2, of the U. S. Article 1, Section 9,

> "Gives the prisoner a right to have judicial inquiry in the court of the United States into the very truth and substance of the cause of his detention and where facts dehor the record which are not open to consideration upon appeal are alleged to show a denial of constitutional rights a judicial hearing must be granted to ascertain the truth or falsity of the allegation".

Appellant alleges he was denied his right to a hearing on his Petition for Habeas Corpus, that the Appellee employed fraud upon the court to keep it in error as to the facts, so that the Appellant may never be free to exercise his constitutional rights to a hearing in order to expunge the fraudulent conviction from the record.

The Appellee in his response, (Record P. 15 line 2 through 5 and P. 15 line 15 through 19), specifically refers to Edward

I. Gritz' affidavit.

The Appellant alleges that the Appellee deliberately asserted falsehood to the court as to Edward I. Gritz' affidavit, (an affidavit the Appellee never received). Appellant submits to this honorable court a clear and truthful affidavit of Attorney Edward I. Gritz herein and refers to Record P. 188, specifically line 22 to 32 inclusive.

Said affidavit was presented in the Appellee's response as being "material presumptive evidence" and therefore considered "Purjured testimony", where no affidavit was produced to the court nor to the Appellant. (Record P. 134 line 22 through 30).

Appellant alleges that the failure of the adverse party to mail the affidavit makes the hearing a sham and a prejudice one where it was influenced by "Fraudulant intent or mistake", a violation appellant's rights under Constitution clause of "Fair and impartial".

Appellant states that the use of perjured testimony was the basis of the denial on Appellant's Petition for a Writ of Habeas Corpus, and also claims that said fraudulant practice is inexcusable, negligence on the part of the Appellee and a clear showing of violation of the 5th and 14th Amendment.

Appellant states that the statements made by the Appellee in his response in feference to Edward I. Gritz' affidavit are false and knowingly to be false by him and was used to misguide and mislead the Federal District Court.

Appellant views with alarm the many references made by

Appellee's response to Appellant's Petition for a Writ of Habeas Corpus as to the affidavits of counsels of record. One affidavit Appellant never received, nor was ever written. (Record P. 134 line 22 through 30). The other (a statement purporting to be under oath, but in fact, was nothing more than a declaration which was made under penalty of purjury). Record P.P. 20, 21, 22 and 23.

It would appear doubtful that the court would consider this evidence, but it did, and in doing so, it denied the Appellant equal protection of the law, because a declaration is not in accordance to the rules regarding evidence before the Federal District Court. Appellant states that the court has taken as unfair advantage of him and his Petition for a Writ of Habeas Corpus whereby Appellant could not refute "evidence" of the Appellee's response he has never received, a clear showing of violation of the 14th Amendment.

> "Any violation of any personal right by either party would be against due process of law. A hearing should be according to the established laws and methods that maintain essential rights is the essence of this amendment."

VI

DEFECTIVE INDICTMENT OR INFORMATION IN VIOLATION OF THE CONSTITUTION OF UNITED STATES OF THE FOURTEENTH AMENDMENT.

<u>Penal Code of the State of California, 664</u> states

> "every person who attempts to commit any crime, but fails, or is prevented or intercepted in perpetration thereof, is punishable where no provision is made by law for the punishment of such attempts, as follows:
>
> Subd: (2) <u>Offense punishable by less than five years</u>. If the offense so attempted is punishable by imprisonment in the state prison for any term less than five years, the person guilty of such attempt is Punishable by imprisonment in the county jail for not more than one year."

In <u>People vs. Crain</u>, 1951, 228, P 2d 307, 102 C.A. 2d 566,

"In prosecution of osteopathic physician and surgeon for attempting to commit abortion and conspiracy to commit abortion, evidence was insufficient to corroborate testimony of prosecutrix"

In <u>Frye vs. Settle</u>, 168 F. Supp. 7, "the court held that there can be no conviction or punishment for a crime without a formal and sufficient accusation.

Under penal code of California, §274, providing that the substantive offense of abortion is punishable by imprisonment in the state prison "not less than two nor more than five", the maximum sentence for abortion is five years, and the punishment for attempt to commit abortion would be two and a half years under penal code §664 Sub (1).

In People vs. Superior Court, 116 Cal. App 412, 414, 415 (2P. 2d 843), it was held that subdivision 1 of section 664, "provide for punishment for an attempt to commit a substantive crime at one half of the maximum punishment prescribed for the crime itself". See also Ex parte Hope, 59, Cal 423. On the other hand, the language used in the title and body of subdivision 2 of section 664, is identical in that if the offense is punishable by "less than five years".

In view of the clear wording found in the body of subdivision 1 and 2 of section 664 of the penal code, Appellant contends that said statue is clearly applicable in this instant case, as follows:

a).indictment or information to be valid, it must allege all the facts necessary to bring the case within statutory definition.

Appellant alleges that the information or indictment does not contain the requirements to warrant a suspicion strong enough to show guilt of the crime of abortion under §274 of the Penal Code of California. In this instant case, there was nothing to prove intent as provided by §21 of the Penal Code of California. There was no evidence shown to manifest the circumstances connecting Appellant with the offense. There was no evidence of having any instruments, medicines, drugs, nor anything at all to connect the Appellant with the crime of abortion. (Cl. Tr. on Appeal No. 216093, P.9, line 20 through 26 and P. 10, line 1 through 9)

In this case, the testimony of the prosecution testified

she was not pregnant and that the test she took to determine pregnancy, was negative. (Cl. Tr. P. 10 line 1 through 9) Therefore, Appellant can say that count I and II was no more than an attempt to produce a miscarriage. However, on Page 10, line 10 through 16, Cl. Tr., the prosecutrix's states that her menstraul periods stopped sometime in October, never the less, this is not proof that she was pregnant.

Statement of facts. In reference to the information that was filed in respect to count I and II, charging the Appellant with the crime of abortion (under Penal Code §274 of California) committed upon Marcella Allen on December 10, 1958, and January 17, 1959, the prosecutrix testified that on December 10, 1958, she had a conversation with Ann Strendler concerning her pregnancy and as a result of this conversation, she met a Joy Gangle and on the same evening, she met the Appellant, whereupon she and the Appellant went to Appellant's office where she claims the abortion was performed on her. She further testified she saw the Appellant again on December 26, 1958, that Appellant met her on Pico at Western Avenue and from there, the Appellant took her to his office a second time and attempted to abort her. She also testified that the Appellant attempted to abort her the third time on January 17, 1959, and on this occasion, she was accompanied by Joy Gangle, and that she later went to the hospital where they completed the abortion.

Appellant served the maximum term of five years, preceded by one year in the county jail, a total of six years.

The information charges an offense not shown to exist

either by information or indictment at the time of arraignment in Superior Court was in derogation of Appellant's constitutional rights.

VII

DEFECTIVE SENTENCE IN VIOLATION OF THE CONSTITUTION OF UNITED STATES AMENDMENT FOURTEEN.

In People vs. Kehoe (1949) 33, Cal 2d 711, 713, (704 P2d 321)

In People vs. Knowles (1950) 35 Cal 2d 175, 187 (217 P2d 1)

> "Section 654 of the California Penal Code prohibits double punishment of the commission of a single act".

Double punishment or multiple punishment, under the Penal Code of California §654, by prohibiting multiple punishment, this portion of the code prohibits subsequent prosecution for "the same act or omission" resemble the protection of the double jeopardy doctrine except that the Penal Code of California, §654 becomes available only after there has been "an acquital or conviction and sentence".

In re: John Wellington Johnson on Habeas Corpus: (Crim. No. 10193. In Bank December 2, 1966) "The basic principle that forbids multiple punishment for one criminal act precludes infliction of more than one punishment for a series of acts directed toward one criminal objective.

In People vs. Quinn, 61 Cal 2d 551, 555, (39 Cal Rptr 393 P 2d 705)

In People vs. Tidmen, 57 Cal 2d 574, 585, (21 Cal Rptr 207, 370 P2d 1007)

In People vs. Logan, 41 Cal 2d 279, 290, (260 P2d 20)

states "the basic principle that forbids multiple punishment for one criminal act".

West's annotated California Codes, Article 1, Section 13, Clause 4, Note 6, "Where it appears from the definition of two offenses that all elements of one are included in the other, a conviction of the latter offense is also a conviction of the former, within meaning of Constitution's provision relating to double punishment for the same offense.

In People vs. Mc Llvain (1943) 130 P 2d 131, 55 C.A. 2d 322, Penal Code of California, 654.

In People vs. McDaniel, (1957) 154 C.A. 2d, 475, 316 P2d 660. "The state cannot split up one crime and prosecute it in several parts and a defendant cannot be convicted and punished for two distinct crimes growing out of the same identical act. See also People vs. Mendoza (1943) 131, P. 2d 662, 55 C.A. 2d 625.

In Darlington vs. Turner, 202 U.S. 195, 26 Supp. Ct. 630, 50 L. Ed 992. Also in U.S. vs. Pulcston, 106, Fed. 294, 45 C.C.A. 297, states, "In the determination of issues involving life, liberty or property, and a statue creating a presumption, which is entirely arbitrary and which operates to deny a fair opportunity to repel it --- or to present facts pertinent to one defense, is void and its findings is clearly erroneous, it may be disregarded".

Appellant argues that penal code, section 654, applies to the two convictions as charged in counts I and II of the information. Appellant relies upon Amendment 6, Rights of the Accused in Criminal Cases and Amendment 5 and 14 of the Federal Constitution of the United States and California Constitution, In re Sacramento Legal Press, March 7, 1967,

> "multiple sentence forbidden by Section 654, whether consecutive or concurrent, imposed excessive punishment beyond the power of the Sentencing Court and can be corrected on Habeas Corpus".

Cases cited:

In Neal vs. State of California, 1960) 55 Cal 2d 11, 16-17;
In re Cruz, (1960) 64 Cal 2d 178, 181;
In re Ward, Supra, 64 Cal 2d 672;
In re Romano (1966) 64 Cal 2d 826;
In re Ponce Supra 65 A.C. 375;
In re Henry Supra 65 A.C. 351

Appellant was charged and convicted in count I and II for the crimes of abortion in violation of Section 274 of the Penal Code of California. In this instant case, the Appellant argues that, whereby two charges were filed in pursuance of the one agreement to procure the miscarriage, the various things done by Appellant were done upon different days, they were all done in pursuance of one agreement and to accomplish one particular purpose.

Punishment for two offenses arising from the same act is prohibited by the constitutional and common - law rule against

multiple punishment for necessarily included offenses, In People vs. Kehoe, 33 Cal 2d 711, 713 (204 P. 2d 321) Section 654 Penal Code of California, "providing that an act or omission which is made punishable in different ways by different provisions of this code, may be punished under either of such provisions, but in no case can it be punished under more than one, prohibits double punishment for commission of a single act unless one is necessarily included within the other. See: People v. Smith (1951) 224 P. 2d 719, 36 C.2d 444.

VIII

THE COURT WAS REQUIRED TO CONDUCT A FULL EVIDENTIARY HEARING TO ESTABLISH THE EXISTENCE OF THE FACTS SET FORTH IN THE ALLEGATION IN THE PETITION.

In Townsend vs. Sain, 372 U.S. 293 (317), the courts said "If, for any reason not attributable to the inexcusable neglect of Petitioner evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled".

In Carroll vs. Turner, 262 F. Supp. 486, "the court held that where the federal Habeas Corpus Petition set forth facts indicating the sentence was void and subject to collateral attack, an evidentiary hearing must be held where he had to receive a full and fair evidentiary hearing on this point in the state court at the time of trial or in a collateral proceeding where the facts set forth were in dispute".

In Fortner vs. Balkeom (Fifth Circuit 7/7/67), "the Court said that where substantial constitutional questions are presented which are unrefuted, the Court should duly consider their validity and not dispose of the Petition in a perfunctory manner.

In Jones vs. Cunningham (1963) 371 U.S. 236 L. Ed.285, 83 S. Ct. 373, 92 A.L.R. 2d 675, "the Court held that the Writ of Habeas Corpus in the United States District Court was a proper remedy to test the legality of the State Court, judgment of conviction while prisoner was on parole from the state prison.

In Robinson vs. California, 370 U.S. 660, 8 L. Ed 2d 758, 82 S. Ct. 1714, (1962) Was heard after death of Petitioner.

This court has the authority to grant a full judicial hearing to ascertain the truth or falsity of the allegations: In Darr vs. Burford, 339 U.S. 200, 208, 94 L. Ed. 761, 769, 70 S. Ct. 587. Also, A (Denial of a hearing will not expunge the fradulent conviction from the record) 28 U.S.C. 2254.

In Massey vs. Moore, 348 U.S. 105, 99 L. Ed. 135, 75, S. Ct. 145; Frislie vs. Collins, 342 U.S. 519, 96 L. Ed. 541, 72 S. Ct. 509. Also: Petitioner's Allegation if true, could present serious questions under the Fourteenth Amendment and those allegations would therefore entitle him to a hearing.

Massey Vs. Moore (U.S.) Suprs. Pennsylvania ex. rel. Herman vs. Claudy, 350 U.S. 116, 100 L. Ed. 126, 76 S. Ct. 223.

I think that it is appropriate at this time to elaborate the consideration which ought properly to govern the grant or denial of evidentiary hearings in Federal Habeas Corpus procedings.

The broad consideration bearing upon the proper interpretation of the power of the Federal Courts on Habeas Corpus are reviewed at length in the Court's opinion in Fay vs. Noia, 9 L. Ed. 2d 837, and need not be repeated here.

It must be pointed outtthat the historic conception of the writ anchore in the ancient common law and in our Constitution as an efficacious and imperative remedy for detention of fundamental illegality has remained constrant to the present day.

The act of February 5, 1867 C 28, Section I, 14 Stat 385-386 which is extending the Federal Writ to state prisoner described the power of the Federal Courts to take testimony and determine the facts De Novo in the largest terms - Fay vs. Noia, 9 L. Ed. 855. The hearing provisions of the 1867 Act remain substantially unchanged in the present codification 28 U.S.C. Section 2243.

In construing the mandate of Congress so plainly designed to afford a trial type proceeding in Federal Court for state prisoners aggrieved by unconstitutional detentions. The Supreme Court has consistently upheld the power of the Federal Courts on Habeas Corpus to take evidence relevant to claims of said detention, Frank vs. Mangum, 237, U.S. 309, 331, that court has recognized that Habeas Corpus in the Federal Courts by one convicted of a criminal offense is a proper procedure "to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution" even though the events which were alleged to infringe did not appear upon the face of the record of his conviction. Hawk vs. Olson, 326 U.S. 271, 274, 90 L. Ed. 61, 64, 66 S. Ct. 116 Brown vs. Allen and numerous other cases have recognized this: State prisoners are entitled to relief on Federal Habeas Corpus, to argue and present evidence must never be totally foreclosed. See Frank vs. Mangum 237 U.S. 309, 345-350, 59 L. Ed. 969, 987-989, 35 S. Ct. 582 (dissenting opinion of Mr. Justice Holmes).

The Act of February 5, 1867, affording State prisoners a forum in the Federal Trial Courts for the determination of claim of detention in violation of the Constitution. The language of Congress, the history of the Writ, the decisions of the Supreme Court all make clear that the power of inquiry or Federal Habeas Corpus is plenary.

Therefore, where an applicant for a Writ of Habeas Corpus alleges facts which, if proved, would entitle him to relief, the Federal Court to which the application is made has the power to receive evidence and try the facts anew.

In Brubaker vs. Dickson, 310 F 2d 30 (1962) Page 33 (1-2) states that allegations of fact outside the trial record must be considered in determining whether the Petitioner alleged a denial of Appellants constitutional rights to the effective aid of counsel. A contrary rule would fall short of protecting this right.

The opinions in Brown Vs. Allan - is this:

Where the facts are in dispute, the federal court in Habeas Corpus must hold an evidentiary hearing if the Habeas Applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words, a federal evidentiary hearing is required (372 U.S. 313) unless the state court trier of fact has after a full hearing reliable found the relevant facts.

THERE CANNOT EVEN BE THE SEMBLANCE OF A FULL AND FAIR HEARING UNLESS THE STATE COURT (372 U.S. 314) ACTUALLY REACHED

AND DECIDED THE ISSUES OF FACT TENDERED BY THE DEFENDANT. IF RELIEF HAS BEEN DENIED IN PRIOR STATE COLLATERAL PROCEEDINGS AFTER A HEARING BUT WITHOUT OPINION, IT IS OFTEN LIKELY THAT THE DECISION IS BASED UPON A PROCEDURAL ISSUE, THAT THE CLAIM IS NOT COLLATERALLY COGNIZABLE - AND NOT ON THE MERITS.

The United States Supreme Court holds that a Federal Court must grant an evidentiary hearing to a Habeas applicant under the following circumstances; (In opinions in Brown vs. Allan)

1.) the merits of the factual dispute were not resolved in the state hearing;

2.) the state factual determination is not fairly supported by the record as a whole;

3.) the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing;

4.) the material facts were not adequately developed at the state court hearings;

5.) there is a substantial allegation of newly discovered evidence;

6.) for any reason it appears the state trier of the fact did not afford the Habeas applicant a full and fair factual hearing.

In this instant case, each one of the above mentioned irregularities set forth occured.

CONCLUSION

The correlation of the material facts in substance alone

supports Appellant's allegations in his application for a Writ of Habeas Corpus, wherefore, it is respectfully urged that the previous orders of the Court below be reversed in conformity with the applicable decisions herein cited and that the Appellant be granted a full evidentiary hearing and to have the attendance of witnesses and determine the facts as they should have been at the trial, to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of our great document "the Constitution of the United States", and what other relief this Honorable Court may believe is fair and just under the foregoing circumstances.

Respectfully submitted,

Walter F Keys

WALTER F. KEYS
Appellant In Pro Per

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Walter F Keys

WALTER F. KEYS

Appellant In Pro Per

PROOF OF SERVICE BY MAIL
1013a and 2015.5 C.C.P.

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on November , 1967, I served the within APPELLANT'S OPENING BRIEF (Keys v. Dunbar - No. 22036) on the following named parties by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

Clerk, U. S. District Court
Central District of California
312 North Spring Street
Los Angeles, California 90012

Thomas C. Lynch, Attorney General
State of California
600 State Building
Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November , 1967, at Los Angeles, California.

Orig. & 20 copies to: United States Court of Appeals, For the Ninth Circuit
United States Courthouse and Post Office Building
7th & Mission Sts., San Francisco, California

Subscribed and sworn to before me
this day of November, 1967.

Notary Public in and for
the State of California.